

***United States Court of Appeals
for the Second Circuit***



**SUPPLEMENTAL
BRIEF**

76-4054

B
P
L
S

United States Court of Appeals
FOR THE SECOND CIRCUIT

RCA GLOBAL COMMUNICATIONS, INC.,

—against—

Petitioner,

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents,

and

ITT WORLD COMMUNICATIONS INC.,
TRT TELECOMMUNICATIONS CORPORATION, and
WESTERN UNION INTERNATIONAL, INC.,

Intervenors.

ON PETITION FOR REVIEW OF REPORT, OPINIONS AND ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

SUPPLEMENTAL BRIEF AFTER REMAND OF PETITIONER
RCA GLOBAL COMMUNICATIONS, INC.

CAHILL GORDON & REINDEL
Attorneys for Petitioner
RCA Global Communications, Inc.
80 Pine Street
New York, New York 10005
(212) 825-0100

Of Counsel:

H. RICHARD SCHUMACHER
ROBERT T. QUINN
JOHN A. SHUTKIN

and

FRANCES J. DEROSA
CHARLES M. LEHRHAUPT
RCA Global Communications, Inc.
60 Broad Street
New York, New York 10004

January 27, 1978

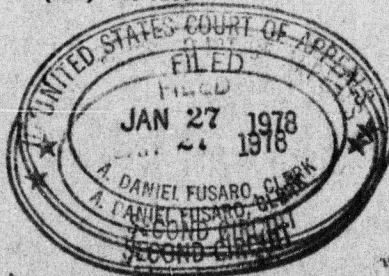


TABLE OF CONTENTS

	<u>Page</u>
Issues Presented for Review	5
Statutes Involved	6
Statement of the Case	7
A. Origins of the Present Controversy	7
B. Prior Commission Proceedings	15
C. Proceedings in this Court	19
D. Proceedings on Remand	21
1. RCA Globcom's Comments	23
2. WUI's Comments	28
3. ITT Worldcom's Comments	29
4. TRT's Comments	31
E. The Commission's Rulings	33
SUMMARY OF ARGUMENT	36
POINT I -	
SUBSTANTIAL EVIDENCE DEMONSTRATES THAT IMPLEMENTATION OF THE INTERIM FORMULA HAS DISSERVED THE PUBLIC INTEREST ..	37
POINT II -	
THE COMMISSION HAS FAILED TO JUSTIFY ITS APPARENT CONCLUSION THAT THE INTERIM FORMULA IS FAIR AS BETWEEN THE PARTIES	45
POINT III -	
THE COMMISSION'S LATEST ORDER HAS FURTHER EXPOSED THE DEFECTS OF ITS EARLIER CON- DEMNATION OF THE ORIGINAL FORMULA	48
POINT IV -	
THE COMMISSION'S HEARING PROCEDURES ON REMAND WERE INADEQUATE	50
CONCLUSION	54

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Appalachian Power Co. v. EPA,</u> 477 F.2d 495 (4th Cir. 1973).....	51n
<u>Armory v. Delamirie, I Strange</u> 505, 93 Eng. Rep. 664 (K.B. 1722)	41n
<u>Bell Telephone Co. v. FCC, 503 F.2d 1250</u> (3rd Cir. 1974), <u>cert. denied,</u> 422 U.S. 1026 (1975).....	51n
<u>Blatch v. Archer, Cowp. 63, 98 Eng. Rep.</u> 969 (K.B. 1774).....	40n
<u>Camp v. Pitts, 411 U.S. 138 (1973).....</u>	38n
<u>Citizens to Preserve Overton Park, Inc.</u> <u>v. Volpe, 401 U.S. 402 (1971).....</u>	39n
<u>City of Chicago v. FPC, 458 F.2d 731</u> (D.C. Cir. 1971), <u>cert. denied,</u> 405 U.S. 1074 (1972).....	39n, 51
<u>FCC v. RCA Communications, Inc.,</u> 346 U.S. 86 (1953).....	44
<u>FTC v. Crowther, 430 F.2d 510</u> (D.C. Cir. 1970).....	47
<u>Garrett v. FCC, 513 F.2d 1056 (D.C. Cir. 1975).....</u>	47
<u>Gotham Silk Hosiery Co. v. Artcraft Silk</u> <u>Hosiery Mills, Inc., 147 F.2d 209 (3d Cir.</u> 1944).....	40n
<u>Hawaiian Tel. Co. v. FCC, 498 F.2d 771</u> (D.C. Cir. 1974).....	44
<u>Mammoth Oil. Co. v. United States,</u> 275 U.S. 13 (1927).....	40n
<u>Marco Sales Co. v. FTC, 453 F.2d</u> 1(2d Cir. 1971).....	47
<u>Mobil Oil Corp. v. FPC, 483 F.2d 1238</u> (D.C. Cir. 1973).....	51n

Page

<u>Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Commission</u> , 539 F.2d 824 (2d Cir. 1976), <u>cert. granted</u> , 430 U.S. 944 (1977).....	51n
<u>Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Commission</u> , 547 F.2d 633 (D.C. Cir. 1976), <u>cert. granted</u> , 97 S. Ct. 1098 (1977).....	52
<u>Office of Communication of United Church of Christ v. FCC</u> , 560 F.2d 529 (2d Cir. 1977).....	46
<u>Rayonier Inc. v. NLRB</u> , 380 F.2d 187 (5th Cir. 1967).....	47
<u>RCA Global Communications, Inc. v. FCC</u> , 559 F.2d 881 (2d Cir.), <u>on rehearing</u> , 563 F.2d 1(2d Cir. 1977).....	4, 14, 15, 19, 21, 30n, 44, 50, 51, 53
<u>Secretary of Agriculture v. United States</u> , 347 U.S. 645 (1954).....	47
<u>Walter Holm & Co. v. Hardin</u> , 449 F.2d 1009 (D.C. Cir. 1971).....	51
<u>White v. Dunbar</u> , 119 U.S. 47 (1886).....	37n

Administrative Decisions

Application for Merger of Western Union Telegraph Co. and Postal Telegraph, Inc., 10 F.C.C. 148 (1943).....	10
International Record Carriers' Scope of Operations, 43 F.C.C. 2d 1174 (1973).....	15
International Record Carriers' Scope of Operations, 54 F.C.C. 2d 532 (1975).....	9n
International Record Carriers' Scope of Operations, 54 F.C.C. 2d 909 (1975).....	8n
International Record Carriers' Scope of Operations, 55 F.C.C. 2d 96 (1975).....	9n
International Record Carriers' Scope of Operations, 58 F.C.C. 2d 250 (1976).....	9n, 27n

	<u>Page</u>
Separate Report of the Commission on Formulas for the Distribution of Int'l Traffic, 10 F.C.C. 184 (1943).....	3, 11-14, 35n, 44, 48
TRT Communications Corp, 46 F.C.C. 2d 1042 (1974).....	27n
Western Union Telegraph Co., 25 F.C.C. 532 (1958).....	9n
Western Union Telegraph Co., 3 F.C.C. 2d 314 (1966).....	9n

Statutes

Administrative Procedure Act	
5 U.S.C. § 553 (c) (1970).....	15n, 50
5 U.S.C. § 556 (1970), <u>as amended</u> , Act of Sept. 13, 1976, Pub. L. No. 94-409, 90 Stat. 1247	50
5 U.S.C. § 557 (1970), <u>as amended</u> , Act of Sept. 13, 1976, Pub. L. No. 94-409, 90 Stat. 1246.....	50
5 U.S.C. § 706 (1970).....	5, 38n
Communications Act	
47 U.S.C. § 151 (1970).....	39
47 U.S.C. § 222 (1970 & Supp.V 1975).....	10, 11
47 U.S.C. § 222(e) (1970).....	<u>passim</u>

Miscellaneous

F.C.C. News Release	
No. 13587 (Nov. 30, 1977).....	33n
F.C.C. Regulations	
47 C.F.R. § 43.61 (1976).....	15n
2 J. Wigmore, <u>Evidence</u> (3d ed. 1940).....	41n

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 4054

RCA GLOBAL COMMUNICATIONS, INC.,

Petitioner,

-against-

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Respondents,

-and-

ITT WORLD COMMUNICATIONS, INC.,
TRT TELECOMMUNICATIONS CORPORATION and
WESTERN UNION INTERNATIONAL, INC.,

Intervenors.

On Petition for Review of Report,
Opinions and Orders of the Federal
Communications Commission

SUPPLEMENTAL BRIEF AFTER
REMAND OF PETITIONER
RCA GLOBAL COMMUNICATIONS, INC.

Petitioner RCA GLOBAL COMMUNICATIONS, INC. ("RCA
Globcom") submits this brief in support of its Petition for
Review which asks the Court to vacate and set aside:

(a) a Report, Order and Notice of Proposed Rulemaking ("the Initial Order") of the Respondent FEDERAL COMMUNICATIONS COMMISSION ("FCC" or "the Commission"), 57 F.C.C.2d 190 (1976) (JA 1-36, SJA 1121-47)*, released on January 7, 1976 in its Docket No. 19660;

(b) a Memorandum Opinion and Order of the Commission ("the Reconsideration Order"), 61 F.C.C.2d 183 (1976) (JA 70-84), entered on petitions for reconsideration of the Initial Order and released on September 27, 1976; and

(c) a further Memorandum Opinion and Order ("the Order on Remand"), FCC 77-805, ___ F.C.C.2d ___ (1978), (SJA 949-64)*, which the Commission adopted on November 30, 1977 and released on January 6, 1978, in response to this Court's remand for further findings of fact,

insofar as the aforesaid Orders prescribe, or purport to prescribe, amendments to the so-called "International Formula"

* "JA #" refers to the pages of the Joint Appendix which RCA Globcom filed in connection with this Court's initial review of the Initial Order and the Reconsideration Order. "SJA #" refers to the pages of the Supplemental Joint Appendix which is being filed with this brief and which contains the further record made on remand. The pages of the two volumes are numbered in one series, with pages 1-934 appearing in the Joint Appendix and pages 935-1147 in the Supplemental Joint Appendix. For the Court's convenience, the Commission's Initial Order while reproduced in the Joint Appendix (at 1-36), has also been reproduced in the Supplemental Joint Appendix (at 1121-47). In this brief, citational references to that decision are to its location in the Supplemental Joint Appendix.

required by Communications Act § 222(e), added by 57 Stat. 5 (1943), 47 U.S.C. § 222(e)(1970).

The International Formula governs the distribution by The Western Union Telegraph Company ("Western Union") among RCA Globcom and other international carriers of record communications (chiefly the three Intervenor) of telegram traffic which customers file with Western Union, a domestic carrier, for ultimate delivery to overseas destinations.

The Initial Order, as confirmed in this respect by the Reconsideration Order, annulled a distribution formula (SJA 1146) which the Commission had ordered, largely on the basis of intercarrier agreement, in 1943, see Separate Report of the Commission on Formulas for the Distribution of International Traffic, 10 F.C.C. 184, 189 (1943). During its three decades of operation, that original formula had provided the American public with an overseas telegram service which, at all times, was of the highest quality that the evolving state of the art allowed. (JA 327-32; see 559 F.2d at 889, SJA 943)

The Commission, in its rulings of 1976, substituted for this regime a so-called "interim formula" as a step towards its ultimate preference -- an "all-routed" plan which it proposed to study further before implementing. (SJA 1140-43) This latter scheme contemplated the effective elimination of a formula mode by requiring each customer of Western Union to

choose a specific forwarding carrier for his overseas telegrams whether he wanted to do or not. (SJA 950-51, 1140)

This Court, expressing considerable doubt about the good sense of the tentative "all-routed" plan, vacated, RCA Global Communications, Inc. v. FCC, 559 F.2d 881 (2d Cir.) (SJA 935-45), on rehearing, 563 F.2d 1 (2d Cir. 1977) (SJA 946-48), and remanded for a determination "'whether the promulgation of the "interim" formula has, in the opinion of the FCC, a factual basis in the record independent of the FCC's tentative preference for an all-routed system'" (SJA 948). The panel, which retained jurisdiction of the matter (SJA 948), directed the Agency to make "findings" and draw "conclusions" so as "to enable the court to render its decision." (SJA 948)

The Commission, viewing its continued hearing as one to determine "whether the interim formula may be justified outside of its role as precursor to an all routed allocation formula" (SJA 952), now has adopted and forwarded to the Court its further Order on Remand (SJA 949-64). In this latest Opinion, announced after a perfunctory consideration of a single round of comments by the parties, the FCC abandons plans for any further consideration of the linch-pin of its prior rulings, viz. the "all-routed" scheme. (SJA 950-51) It has concluded, nevertheless, that a rationalization for its "interim formula" -- one roughly 180° out of phase with its earlier theories -- can be found. (SJA 963-64)

In its third try the Commission, we submit, again has failed to justify prescription of the "interim formula" in the manner required by Communications Act § 222(e), 47 U.S.C. §222(e)(1970), and the Administrative Procedure Act, 5 U.S.C. §706 (1970). RCA Globcom asks that its Petition for Review be granted and that the Commission's many rulings purporting to cancel the carriers' agreed formula of 1943 be set aside.

Issues Presented for Review

1. Whether substantial evidence supports the Commission's finding that the "interim formula", which it would now make permanent, is in the "public interest" as required by Communications Act § 222(e)(3), 47 U.S.C. § 222(e)(3) (1970)?
2. Whether the Commission has adequately justified its adoption of a new test (viz., equality of access to the pool of unrouted messages) as the measure of intercarrier fairness required when the Commission prescribes a new International Formula under Communications Act § 222(e)(3)?
3. Whether the Commission ever has adequately justified its conclusion that the "original" International Formula agreed to by the carriers is contrary to the standards of Communications Act § 222(e)(3)?
4. Whether the Commission, which limited the parties to a single round of comments on remand and thereafter based

its Order on an uncritical acceptance of one side of the controversy, afforded RCA Globcom the "full hearing" to which it was entitled and which the Commission was required to conduct, under Communications Act § 222(e)(3)?

We submit that the proper answer to each of these questions is "no". A negative answer to any one of them should lead to the vacatur of the Commission's Orders purporting to prescribe the "interim formula".

Statutes Involved

The statutory provisions materially cited in this brief are reproduced in an appendix. Of particular salience are subdivisions (1) and (3) of Communications Act § 222(e), 47 U.S.C. § 222(e) (1970), which provide:

"(1) In the case of any consolidation or merger of telegraph carriers pursuant to this section, the consolidated or merged carrier shall, except as provided in paragraph (2) of this subsection, distribute among the international telegraph carriers, telegraph traffic by wire or radio destined to points without the continental United States, and divide the charges for such traffic, in accordance with such just, reasonable, and equitable formula in the public interest as the interested carriers shall agree upon and the Commission shall approve: Provided, however, That in case the interested carriers should fail to agree upon a formula which the Commission approves as above provided, the Commission, after due notice and hearing, shall prescribe in its order approving and authorizing the proposed consolidation or merger a formula which it finds will be just, reasonable, equitable, and in the public interest, will be, so far as is consistent

with the public interest, in accordance with the existing contractual rights of the carriers, and will effectuate the purposes of this subsection.

* * *

"(3) Whenever, upon a complaint or upon its own initiative, and after a full hearing, the Commission finds that any such distribution of telegraph traffic among telegraph carriers, or any such division of charges for such traffic, which is being made or which is proposed to be made, is or will be unjust, unreasonable, or inequitable, or not in the public interest, the Commission shall by order prescribe the distribution or such telegraph traffic, or the division of charges therefor, which will be just, reasonable, equitable, and in the public interest, and will be, so far as is consistent with the public interest, in accordance with the existing contractual rights of the carriers."*

Statement of the Case

A. Origins of the Present Controversy

The prior proceedings in this Court already have familiarized the panel with the broad outlines of the parties' controversy. This dispute concerns the propriety of the Commission's prescription of the method by which Western Union distributes among the "international record carriers" (or "IRCs"), for onward transmission abroad, telegrams which customers file with Western Union for delivery to overseas destinations.

* Emphasis supplied here and elsewhere throughout unless otherwise indicated.

Western Union is the monopoly supplier between points within the continental United States of conventional message telegram service. RCA Globcom and the other intervening IRCs presently operate circuits, usually in cooperation with an appropriate foreign "administration," for the transmission of telegrams (and other forms of communication) between the contiguous United States and overseas points. The foreign administrations (the entities which provide telecommunications services within their respective countries) typically are government monopolies (e.g., the British Post Office); normally they maintain such circuits with each of the American IRCs authorized to operate directly to that country.*

RCA Globcom maintained, until the intervention of war-time measures in 1942, offices for the receipt of overseas traffic in major cities in all parts of the country.** In the post-war period, however, the Commission has limited the four IRCs' direct receipt of traffic from customers and their

* An American IRC does not necessarily maintain direct circuits to every destination it is licensed to serve. Some carriers access some destinations through the facilities of one or more intermediate "transitting" carriers. RCA Globcom provides telegram service to more destinations -- over 200 -- and to more destinations directly than any other IRC.

** They were New York, Washington, San Francisco, Chicago, Los Angeles, Philadelphia, Boston, Detroit, New Orleans and Seattle. See International Record Carriers' Scope of Operations, 54 F.C.C.2d 909, 912 (1975).

direct delivery of traffic to customers to a handful of so-called "gateway cities" -- at present New York, San Francisco, Washington, Miami, and New Orleans.*

A person wishing to send a telegram overseas may file it directly with an IRC in one of the "gateways." Elsewhere in the country (the "hinterland" in industry parlance), the customer must, and in the "gateways" he may, file his telegram with Western Union for forwarding to an IRC for overseas transmission.** In contemporary practice, the circuits of

* See International Record Carriers' Scope of Operations, 54 F.C.C.2d 532 (1975); 58 F.C.C.2d 250 (1976). See also SJA 1087-98.

** The Commission long has enforced a so-called "country-to-country" rate structure whereby uniform rates apply to a given item of traffic sent from any point in the United States to a given foreign point. If Western Union participates in the transmission of an overseas telegram the IRC involved makes payment to Western Union for its part in the transmission.

The Communications Act § 222(e), 47 U.S.C. § 222(e)(1970), requires a formula to govern both Western Union's distribution of overseas telegrams among the IRCs and the division of tolls between Western Union and the IRCs with respect to such telegrams. The Commission has, from time to time, fixed by Order the rates due Western Union for its domestic haul of overseas telegrams, most recently increasing them in 1975. See International Record Carriers' Scope of Operations, 55 F.C.C.2d 96 (1975). The "country-to-country" tolls charged customers for overseas telegrams have remained substantially unchanged since 1958. See Western Union Telegraph Co., 25 F.C.C. 532, 535 (1958). In 1966 the Commission authorized a "pass-along" of portions of an increase which it then granted to Western Union for its domestic haul. See Western Union Telegraph Co., 3 F.C.C.2d 314 (1966).

Western Union connect with those of each of the IRCs at computerized interfaces. Typically, only a second or two elapses between the Western Union operator's release of a telegram text and its receipt, after forwarding by an IRC, in the message center of the foreign administration responsible for ultimate delivery to the addressee.

The institutional arrangement above described stems from Congress' enactment in early 1943 of Communications Act §222, 47 U.S.C. § 222 (1970), as amended (Supp. V. 1975). The statute authorized the merger, subject to Commission supervision, of Western Union and the former Postal Telegraph, Inc., thereby creating the substance of a domestic telegraph monopoly. The Commission, following extensive public hearings, approved such a merger in September 1943, Application for Merger of Western Union Telegraph Co. and Postal Telegraph, Inc., 10 F.C.C. 148 (1943), and it was promptly accomplished.

At the time of the merger Western Union operated a "cables division" which provided overseas service (chiefly to Latin America and to the Eastern Hemisphere by way of cables to the United Kingdom and France). (Id. at 152, 154) RCA Globcom, which had pioneered in the use of radio for inter-continental communication, also operated to all parts of the world and was the principal factor in the trans-Pacific service where, at the time, cable facilities were limited.

Communications Act § 222 required, inter alia, that Western Union divest itself of its overseas operations -- a provision which ultimately gave rise to Intervenor Western Union International, Inc. ("WUI") -- and that Western Union distribute its outgoing overseas telegram traffic among the various international record carriers in accordance with a formula to be devised pursuant to Communications Act § 222(e) (quoted, in relevant part, at pp. 6-7, supra).

Western Union and the various international record carriers negotiated the terms of a formula as part of the Commission proceedings which eventuated in the merger Order. The Commission announced the required distribution arrangements in a report published at the same time as the merger Order. See Separate Report of the Commission on Formulas for Distribution of International Traffic, 10 F.C.C. 184 (1943). The formula thus promulgated reflected only minor changes, prescribed by the Commission, in "a detailed and comprehensive formula upon which substantial agreement had been reached by them [the carriers]." (Id. at 189) *

Very briefly, a customer filing a telegram with Western Union for overseas delivery could, if he wished, specify

* The formula, as amended in 1963 in minor respects not here relevant, appears in full text at JA 45-69 and is summarized in the Separate Report. See, as well, the account appearing at pages 10-13 of the principal brief filed by RCA Globcom under date of October 29, 1976 in the earlier proceedings here.

a forwarding international carrier; in such event, Western Union was to honor the customer's "routing". In cases where Western Union's customers chose not to "route" their overseas telegrams, the domestic carrier was to distribute them among the IRCs in accordance with quotas which the formula established for 52 destination subareas. Western Union was to allocate unrouted traffic to each subarea so as to give each IRC, if possible, a proportioned share of the total telegram revenues to that subarea arising from both the traffic forwarded by Western Union and the IRCs' self-originated "gateway" traffic.* (SJA 1123-25)

The quotas were based, in general, on the IRCs' traffic distributions to the various subareas in 1942 (or other appropriate reference periods in the case of territories to which service had been disrupted by the war then in progress.) There were, however, two significant and agreed exceptions to this pattern in the case of RCA Globcom. The latter did not receive (and never had) quotas under the original formula for gateway-originated traffic to destination subareas in Latin

* If unrouted traffic available for distribution in a given year was insufficient to provide an IRC with its proportioned share to that area, this created a "deficiency" (and a corresponding "overage" for other carriers). The deficiencies were to be made up, if possible, by distributions in later years. (SJA 1124) Over the life of the original formula, RCA Globcom and WUI accumulated substantial net "deficiencies" although each had "overages" (and other carriers had "deficiencies") to some destination subareas. (SJA 1132)

America, the West Indies, Africa, Europe and the Near East. (10 F.C.C. at 191, SJA 1124-25) Thus its own self-originated traffic (the major fraction of its overseas telegram file (SJA 1130)) had little, if any, effect on the distribution of unrouted messages by Western Union.

Secondly, the agreed formula accorded RCA Globcom an enlarged allotment of "hinterland" traffic to various Eastern Hemisphere points out of the messages otherwise attributable to Western Union's "cables division". (10 F.C.C. at 190) "This method," the Commission said,

"tends to balance the advantages RCAC has had with respect to in-bound traffic against the advantages the Western Union cable system has had in obtaining out-bound traffic, and by neutralizing the resulting inequalities, produces a fair basis for division of traffic between RCAC and . . . Western Union. . . . The traffic thus to be transferred from the Western Union cable system to RCAC is limited to messages to continental Europe and points beyond. This serves the public interest in having direct communication with foreign points, since the messages thus transferred would have to be relayed at intermediate points if handled by cable, but can be handled by radio directly to destination. In addition, the United States international communication system as a whole is financially benefited, because RCAC generally retains a larger portion of the toll on these messages than Western Union would retain." (Id. at 190-91)

The Commission explained the fundamental rationale of the original formula in these terms:

"The quota of each international carrier is to be satisfied by the combined volume of routed and unrouted messages transferred to each such carrier by

the merged company, and as well by any messages which the international carrier itself originates over its own facilities. This provision assures that the sender's choice of any particular route will be respected; but by combining routed, unrouted, and self-originated traffic, it diminishes the incentive of the international carriers to expend effort and revenues in attempts to divert traffic from each other by solicitation efforts which may not improve quality of service; and it also diminishes the necessity for these carriers to build up additional facilities for the collection of their own traffic, in duplication of the existing facilities of the merged company. These savings should contribute to a more efficiently and economically operated international telegraph system." (Id. at 191)

The Agency also addressed the "competitive" aspects of the prescribed arrangement, saying:

"To the extent that the proposed formula results in fixed quotas for the respective carriers, it limits competition in the international telegraph field. This is a natural result of a formula which the statute contemplates shall be initiated by agreement among the carriers and shall resolve the conflicting equities of the various carriers. In other respects, however, the formula continues and even promotes reasonable competition. RCAC, an active and aggressive carrier, will still be competing with all the other carriers in New York City, Washington, and San Francisco, the principal centers for foreign telegraph traffic." (Id. at 195)

Overseas telegraph service was provided to the public under the agreed formula until, as a result of the Commission's Orders in this Docket, it was replaced by the so-called "interim formula" in November 1976. (See 563 F.2d at 3, SJA 948, SJA 950) On this case's earlier appearance here, the Court commented, as follows, with respect to this 33-year period:

"[H]igh quality of service is conceded and there is no showing that the carriers have not availed themselves of the most modern technological devices.

"The Commission has professed to be acting 'to regulate [the carriers] in the public interest' and states that the public is interested 'in a rapid, efficient communications service with adequate facilities and reasonable charges' (JA 75) but nowhere in the record is there any proof, much less a finding, that the public is not receiving such service." (559 F.2d at 889, SJA 943)

B. Prior Commission Proceedings

Following complaints by Intervenor ITT World Communications Inc. ("ITT Worldcom") (see JA 113), the Commission released in November 1973 a designation Order, 43 F.C.C.2d 1174 (1973) (JA 93-101). The Order instituted an investigation and rulemaking proceeding to determine whether the Commission should modify the agreed distribution formula under which Western Union and the IRCs had been operating since the Western Union merger and, if so, how. (JA 100-01) The decretal Orders which emerged from the proceeding thus initiated are the subject of this petition for review.

The hearing record compiled by the Commission,* indicated that under the agreed formula, RCA Globcom and WUI

* Despite objections by RCA Globcom and WUI (SJA 1126 fn 10; JA 192-93), the Commission provided for a simple "notice-and-comment" procedure (see 5 U.S.C. § 553(c) (1970)). It limited submissions to written comments by the interested carriers (JA 101); to the collection by Western Union of statistical data from a 13-week "test period" in 1974 (JA 102-05); and the traffic statistics which all record carriers routinely file with the Commission, see 47 C.F.R. § 43.61.

handled larger shares of the unrouted traffic than ITT Worldcom and Intervenor TRT Telecommunications Corporation (the former Tropical Radio Telegraph Company or "TRT") and, carried, in proportion to their total outbound telegram files, larger amounts of unrouted traffic than the other two carriers.* (SJA 1130)

On the basis of this limited record, the FCC released its Initial Order (SJA 1121-47) on January 7, 1976. The Commission concluded that the agreed formula, as it applied to Western Union's distribution of overseas telegrams:

"is unjust, unreasonable, inequitable and not in the public interest; and that the formula should therefore be replaced. . . ." (SJA 1122)

In the Commission's view, the principal defect of the original formula was that:

"with its basic unit the quota system [it] represents a market-sharing device which is by definition antithetical to the free flow of competition which Congress sought to encourage and enhance." (SJA 1122)

There was according to the Commission, "no relation . . . between a given carrier's handling of routed traffic and its handling of unrouted traffic." (SJA 1130) And while there is

* The Commission calculated that RCA Globcom carried during this period 33.12% of routed traffic (both self-originated in the "gateways" and transferred by Western Union) and 48.2% of the unrouted messages. (SJA 1130)

no suggestion in the Commission's Opinion or in the record below that the overseas telegram service provided to the public under the formula has been less than of the highest quality (see SJA 1133; JA 329-30, 614), there was, said the Commission, "no stimulus under the present formula to improve service or increase efficiency." (SJA 1139) The "public", the FCC also stated, is "ill served by a formula which stifles user choice." (SJA 1139) As a substitute for the present formula,

"[W]e [the FCC] will place distribution of traffic on the choice of the customer. For reasons discussed fully below, however, we cannot move immediately to required customer routing. In the interim, we have prescribed a new formula which distributes unrouted traffic among the IRCs in the same proportions as each carrier handles routed traffic." (SJA 1122)

The "however" in the preceding formulation referred to "certain unresolved questions concerning possible operational, economic and legal implications" of the all-routed proposal (SJA 1146) which the Commission's Order directed Western Union, the IRCs and any one else interested to address at further rulemaking proceedings which the Order also noticed. (SJA 1146)

Nevertheless, the Commission wrote, "[a]s an initial measure, we shall prescribe a formula which distributes unrouted traffic among the carriers in direct proportion to their share of routed traffic." (SJA 1146) Thus, under the "interim" formula, routed traffic would be handled as before,

but unrouted traffic to each destination served by more than one IRC -- about 195 destinations all told -- would be distributed by Western Union in the same proportion as those carriers delivered routed traffic to the same place.*

The Commission explained its desire for the "interim" formula by saying that it would "provide an equitable means of distribution which will focus on customer selection and give the IRCs a chance to solicit routings." (SJA 1141) The Order looked forward to "a more aggressive marketing effort and a consequential reduction in unrouted traffic." (SJA 1146)

RCA Globcom petitioned this Court for review of the Commission's Order insofar as it modified the International Formula.** It and others also petitioned the Agency for reconsideration of that Order. (JA 70-71) The Commission, by further Order, stayed the effective date of the prescribed shift from the original formula to the "interim formula" while it considered those petitions. (JA 70)

-
- * The Order provided that the initial basis for these calculations would be the statistics from the 13-week test period which the Commission collected during the proceedings below. (SJA 1144)
- ** The Initial Order also provided for changes in separate formulas governing Western Union's distribution to Canadian and Mexican carriers of traffic addressed to those countries. (SJA 1144-45) These modifications, of no direct concern to the IRCs, are not challenged in this Court.

Insofar as here relevant, the Commission denied those petitions in its Reconsideration Order of September 27, 1976 (JA 70-84), and the formula change took effect in November, 1976 (SJA 975). Meanwhile, the Commission had received from the interested carriers the further comments which it had requested in January concerning the feasibility and desirability of the "all-routed" plan. These comments, while varying in nuance, were uniformly critical of this proposal.* (See SJA 951, JA 814-64)

C. Proceedings in this Court

RCA Globcom's petition for review came on for hearing in this Court on December 3, 1976. The Court reversed, holding that the Commission had failed to justify, by adequate fact findings, the result its decision ordered. RCA Global Communications, Inc. v. FCC, 559 F.2d 881 (2d Cir. 1977) (SJA 935-45)

* As the carriers pointed out and as this Court recognized (559 F.2d at 884, SJA 938), the original formula (and the Commission's "interim" replacement) afforded the opportunity to "route" to any customer who wished to do so. Senders of unrouted overseas telegrams were, in general, infrequent, social communicators unaware of and, in all likelihood, uninterested in the institutional complexities of the country's overseas telegraph communications systems. (559 F.2d at 888, SJA 942, JA 817) A requirement that such a customer make a choice of overseas carrier, whether he wanted to or not, would expose him and Western Union to inevitable expense, annoyances and delay at the point where that carrier received the message for transmission. (559 F.2d at 889, SJA 943).

The Court noted the close link, in the Commission's analysis, between the "interim formula" and its proposed "all-routed" concept -- a concept which the Court viewed as of doubtful plausibility at best. (559 F.2d at 887-889, SJA 941-43). "There seems to be in the record," the Court wrote,

"no comment from the public or anyone who might speak in its behalf on the vital element in the statute, i.e., 'public interest'. Nor is there any factual showing that the service being rendered is not of the highest quality or that it could be improved by an all-routed scheme. To the contrary, high quality of service is conceded and there is no showing that the carriers have not availed themselves of the most modern technological devices." (559 F.2d at 889, SJA 943)

The Court found itself "stymied in attempting to review the adequacy" of the Commission's findings. (559 F.2d at 890, SJA 944). "Upon the record before us," the Court also said,

"public interest seemed to have been ignored except as a phrase used in a conclusory way and not based upon any proof that the public interest will be served by the Commission's new interim plan." (559 F.2d at 891, SJA 945)

The Commission petitioned for rehearing. So did ITT Worldcom and TRT, the Intervenor to which the Commission's formula change had awarded large blocks of additional traffic. The Court, in a further Opinion released on October 5, 1977, granted rehearing to the extent of staying the Court's mandate and remanding to the Agency for a further report to determine

"whether the promulgation of the 'interim' formula has, in the opinion of the FCC, a factual basis in the record independent of the FCC's tentative preference for an all-routed system.'" (563 F.2d at 3, SJA 948)

"Initially", the Court noted in this further Opinion

"a few observations about 'the public interest' which in a factually-unsupported and conclusory way was so stressed in the FCC opinions. We did not find that the formula [the 'interim'] was in, or not in, the public interest. There simply was no proof that related it to the public interest in any way. . . . The FCC's statements of possible improvement are wholly suppositious." (563 F.2d at 2, SJA 947)

While the Commission "very properly was entitled to examine the situation in the light of the present condition of the industry," "[w]e do not regard the 1943 formula as 'unlawful'". (*Ibid.*) The Court further noted that "[w]ith ten months' experience behind them, the parties should be able to submit to the FCC such proof as would bear on the equities or inequities of the 'interim' plan." (563 F.2d at 3, SJA 948)

D. Proceedings on Remand

The Commission promptly issued under date of October 7, 1977, a letter inviting the interested parties "to file comments by November 5, 1977 addressing those issues outlined by the Court's decision". (SJA 972-73) The Agency made clear, as well, that it would receive and consider that single round of comments and no others. (*Ibid.*)

RCA Globcom, the three intervening IRCs, and Western Union all responded. The domestic carrier confined itself to a brief letter in which it expressed its indifference to the shape of the formula which the Commission prescribed so long as it was not the "all-routed solution." (SJA 1118) That scheme, Western Union said, would require "millions of dollars . . . to implement."* (Ibid.)

Western Union also confirmed (ibid.) the substance of the representation which its counsel had made to this Court when the case was before it on a stay motion in October, 1976: by reason of recent improvements in its computer facilities, Western Union could provide fully computerized distribution of traffic to the IRCs under both the original and "interim" formulas. In either case, it would need about 30 days to shift

* The earlier proceedings before the Commission demonstrated (JA 227-34), without dispute, that the market for overseas telegrams (as distinguished from telex and other modes of record communications) is declining and that the carriers all earn a low rate of return, if any at all, in providing telegraph service. The 8-to-9 million outbound overseas telegrams sent each year represent to the IRCs, collectively, revenues of only about \$21,000,000/year, net of payments to Western Union and foreign correspondents (SJA 1129). Western Union's share, for its domestic haul of only about 45% of these messages is, of course, considerably less. We deal, in this phase of the carriers' business, with a small segment of the carriers' operations that confronts a shrinking telegraph market in a time of rising costs.

its operations from one formula to another.*

The comments of the IRCs were more substantial.

1. RCA Globcom's Comments

RCA Globcom urged that the "interim formula" be discarded (without prejudice, of course, to other proceedings if the Commission were so disposed). (SJA-974-1005) It showed that the objective sought to be achieved by the Initial Order's promulgation of the "interim formula" -- viz. "a more aggressive marketing effort and a consequential reduction in unrouted traffic" (SJA 1146) -- was , for all practical purposes, beyond reach. Even worse, pursuit of that objective, as the Commission had recognized when it promulgated the original formula in 1943, would be counter-productive to the public's interest in an economical, efficient overseas telegram service (see 10 F.C.C. 184, 191 (quoted at p. 15-16, supra)).

RCA Globcom's marketing personnel and advertising agencies had mapped out and priced a comprehensive advertising and marketing campaign designed to accomplish the FCC's objective of reaching the occasional senders of "unrouted" overseas

* Due to Western Union's ability to reinstate the original formula on 30 days notice and thereafter continue computerized distribution, a decision by this Court in favor of RCA Globcom would cause no disruption in the overseas telegram service provided to the public by the IRCs.

telegrams who are scattered across the country. Such a campaign would require, for RCA Globcom alone, a first-time expenditure of some \$2,000,000 and additional expensive campaigns to maintain contact with that market. (SJA 981-86)

Such an effort, far out of proportion to any conceivable market results, has not yet been made. The study was presented principally to establish the basic fallacy of the FCC's all-routed preference (now abandoned) and show that there was no reasonable way to reach the entire American market without extravagant and pointless expense.

RCA Globcom also presented data showing that, even without such a massive campaign, it had been required, since the formula change, to approximately double its combined advertising and marketing expenditures devoted to overseas telegram service. They had risen from approximately \$340,000 in 1976 to approximately \$670,000 in 1977. (SJA 982) Given the declining state of the telegraph market, not disputed, and the meager rate of return earned by the IRCs on telegraph service, even the cost of this more limited marketing program was more, in Globcom's view, than telegram rate payors should be required to bear.

RCA Globcom's increased marketing effort, and the incremental efforts presumably of other IRCs (SJA 1040), to maintain or improve market share and thereby decrease unrouted

traffic, had had no discernible effect on the volumes of unrouted traffic generated by the public (SJA 982). Quite the contrary, the traffic compilation of the International Quota Bureau ("IQB") for the first six months of 1977 (SJA 1120) showed that unrouted telegrams represented a larger share of the overseas traffic pool and of the public's filings with Western Union than they had during the Commission's 1974 "test period".*

The explanation for this result was one which an earlier Commission had foreseen and had sought to avoid when it promulgated the original formula in 1943. The only customers whom salesmanship realistically can hope to reach are those volume communicators in the large metropolitan centers which already send (and, generally, "route") large numbers of telegrams.** (SJA 981, 1083) The "interim" formula rewards every shift of a routed message from one IRC to another with

* Unrouted traffic represented in the first half of 1977 84% of Western Union's transfers to the IRCs and 41% of the total overseas traffic pool (SJA 1120) (compared to 76.5% and 33.3%, respectively, in the 1974 "test period" (SJA 1129)).

** A customer with substantial record communication needs usually is a telex subscriber. Telex is a switched system, using teleprinters, which is, in many ways, analogous to the telephone system. The subscriber can "dial up" and transmit to the teleprinters of other telex subscribers. A telex subscriber also may use his teleprinter to transmit to a carrier's operating center the text of a telegram intended for transmission by the carrier to an addressee who is not a telex subscriber. Each IRC has its own gateway telex subscribers.

several other messages.* (SJA 981) Thus, the formula's effect is to encourage, not the pursuit of unrouted traffic, but exaggerated, expensive and predictably countervailing efforts by each IRC to "raid" the customers of its rivals. These efforts, and their attendant advertising and solicitation costs, are needless ones for which users of the overseas telegram service eventually must pay in their rates.

* The shift of routed outbound telegrams from one carrier to another serves to directly shift unrouted outbound telegrams between carriers by reason of the proportional relationship which the "interim" formula establishes between the two categories of traffic. That shift moves a carrier to ignore most senders of unrouted traffic. For example, if at a given time each carrier has 50 routed messages and there are 100 unrouted messages, then a gain of 5 unrouted messages would change that carrier's ratio from 50/50 to about 52+ to 47+ and the carrier would be entitled to somewhat more than 52% of the remaining 95 unrouted messages; giving it therefore, a total of about 107 messages to its 100 previous messages. If on the other hand the carrier diverts 5 theretofore routed messages from a competitor, its ratio would become 57% and it would have not only the 55 routed messages but an additional 57 messages from the unrouted pool, thus giving it 112-115 messages as against the 107 it would obtain by merely converting some previously unrouted traffic. Also, the shift of routed and unrouted outbound traffic inevitably will have a further effect on an IRC's level of inbound telegrams. Foreign administrations (usually one per country) normally distribute United States-bound traffic among the IRCs in proportion to their receipt of traffic from them. (SJA 981) The effect of this new distribution system is to urge the IRCs on to mount major campaigns to divert already routed traffic by large customers. The impact this program will have on the IRCs, the public and tolls was never seriously considered by the F.C.C. It is simply presumed beneficial by the Commission for it furthers competition for its own sake.

RCA Globcom also demonstrated, through the use of the IQB statistics, that the introduction of the "interim" formula had produced another adverse effect upon the public which an earlier Commission had sought to minimize through the original formula. The earlier formula generally had allocated the largest share of unrouted traffic to each destination subarea to a carrier with a long history of direct service to that area. (SJA 986-89) The "interim" formula had the effect of reallocating over 50,000 unrouted messages/year to IRCs which, even today, served particular overseas destinations, not directly, but through intermediate transitting carriers. (SJA 987) This, in turn, drained funds from the American industry by requiring larger payouts from domestic tolls to foreign carriers. (SJA 987) And, as the Commission often has pointed out in other contexts*, indirect routings give rise to less efficient traffic handling. (SJA 988) While the FCC chose to treat this feature of the interim formula as inconsequential, it would seem contrary to the public interest to further burden a declining industry by lessening the American share of traffic tolls.

In its comments RCA Globcom, while adhering to its view that the original formula is sound and should be reinstated,

* See TRT Telecommunications Corp., 46 F.C.C.2d 1042, 1052 (1974); International Record Carriers' Scope of Operations, 58 F.C.C.2d 250, 257 (1976).

also invited the Commission's attention to possible alternative approaches which it might, if it wished, investigate in new proceedings under Communications Act § 222(e)(3). (SJA 996-1002)

2. WUI's Comments

WUI also urged that the Commission abandon the "interim" formula. (SJA 1009-17) It took strong issue with the reasons expressed by the Commission in its Initial Order for annulling the original formula and showed that the record failed to support findings on which the Commission had premised that result. (SJA 1010-16) WUI also demonstrated that the "balancing" provisions of the original formula, which had so concerned the Commission in its Initial Order, affected only 11.7% of formula traffic. (SJA 1014) As shown by WUI's record analysis, the Commission's action seeking to annul the original formula had been predicated on mere assumptions which were not supported by record evidence.*

* In WUI's view the original formula provided no "disincentive" to improve serviced nor did it encourage competitive stagnation. The "balancing" provision of the original formula, which the Commission thought might have had this effect, had no application to 88% of overseas telegram traffic. (SJA 1014) It was WUI's position that the interim formula would not cause it to increase its solicitations, and it said that it had not done so to date. (SJA 1016)

3. ITT Worldcom's Comments

On the other hand, ITT Worldcom, the IRC upon which the Commission had conferred the largest amount of new overseas telegram traffic, hailed the "interim" formula. It called that formula a "positive incentive" to improved service. (SJA 1031) Symmetrically, it denounced the original formula (which it had negotiated and agreed to in return for other concessions) as a "strong disincentive" to carrier efforts to improve service. (SJA 1031)

ITT Worldcom had expressed similar views in many prior briefings. But, in the latest effort, as in the earlier ones, it failed to identify any service improvement, between 1943 and 1976, which even arguably had been affected, let alone deterred, by the shape of the original formula. (During this long period, it is fair to say, the telecommunications industry had enjoyed more rapid and continuous technological advance than almost any other major industry in the world.)

In lieu of such a showing, ITT Worldcom took refuge in the argument of post hoc ergo propter hoc. By affidavit, its General Manager stated that "subsequent to" the Commission's Initial Order of January 7, 1976, ITT Worldcom had made several adjustments in its computerized switching facilities, which adjustments represented, in his opinion, service improvements which might be attributable to the stimulus of the new formula. (SJA 1040-44)

The affiant's views were not subject under the Commission's procedural format to cross-examination nor any kind of rebuttal (which would have shown that the original formula had not stayed the earlier introduction of comparable adjustments by RCA Globcom and, one assumes, other carriers). ITT's General Manager was, nevertheless, cautious enough to acknowledge that "ITT Worldcom is continually engaged in a program to improve and upgrade all of its communications service." Thus it was "possible" that "some or all of the improvements would have been implemented without" the formula change (SJA 1040) -- just as all of the IRCs had steadily improved their services, in substantially more significant ways, throughout the life of the original formula.*

ITT Worldcom omitted to note that the market's enthusiasm for its asserted improvements to increase its share of routed traffic had been rather less marked than its own. During the first six months of 1977, ITT Worldcom's share of routed traffic (Western Union-transferred and IRC-originated) fell to 29%. (SJA 1120) During the 1974 "test period" used to measure traffic distribution under the original formula, ITT Worldcom (when operating under a "disincentive") had collected 34% of such

* Cf. 559 F.2d at 889, SJA 943: "To the contrary, high quality of service [under the original formula] is conceded and there is no showing that the carriers have not availed themselves of the most modern technological devices."

traffic. (SJA 1130) During the period of the interim formula ITT, while supposedly increasing its competitive effort and improving telegraph service, suffered the largest drop in routed telegraph traffic sustained by any IRC. It offered no comment as to this divergence of interim formula theory and market reality. Also, it is of note that ITT Worldcom offered no information whatever concerning costs incurred or anticipated for its marketing and advertising efforts under the regime of the "interim formula".

4. TRT's Comments

TRT, the other IRC to which the Commission had awarded substantial additional traffic, also urged that it be released from its agreement, as reflected by the original formula. (SJA 1056-75) In TRT's view the Agency's mandated shift to the interim formula from the earlier one, had changed little except, happily, the numbers in its revenue account.

It, like ITT Worldcom, laid claim to some modifications (not otherwise identified or explained) in its automation procedures since the implementation of the new formula. (SJA 1074) It acknowledged, however, that they "would have been undertaken irrespective of any change in the formula" since they reduced the carrier's labor costs. (Ibid.) In general, the "automated message switch" which TRT had had on line before

the formula change, was suitable for operations under the new regime as well. (Ibid.)

With respect to efforts to win previously unrouted traffic (and thus achieve one of Commission's declared objectives in promulgating the "interim formula"), TRT had made none at all. Rather, it wrote,

"since the implementation of the 1976 formula, just as under the 1943 formula, TRT has aimed its promotional efforts at high-volume users who subscribe to telex services of either the IRCs or Western Union and has not undertaken anything more than de minimus efforts to obtain routed traffic from those who customarily do not route messages. Thus, the change in the international formula has not altered TRT's 'sales and marketing approach with respect to international cable traffic.'" (SJA 1071-72)

TRT supplied no numbers, "before" or "after", concerning the costs attributable to its "sales and marketing approach." It did, however, note, with satisfaction, that the share of unrouted traffic in the total pool had increased after the implementation of the new formula. (SJA 1072) This "strongly indicates" that the IRCs'

"promotional activities for telegraph traffic have been devoted to increasing their market share among that segment of the market that is sufficiently sophisticated to make informed choices as to carriers." (SJA 1073)

E. The Commission's Rulings

Some three weeks after receipt of these materials the Commission met on November 30, 1977, to adopt its Order on Remand (SJA 949) which, after further editorial revision, it forwarded to the Court during December 1977 and released to the public on January 6, 1978.* The Agency concluded that it would "serve the public interest" (SJA 950) to terminate its proceedings without further address to the "all-routed" plan and to prescribe the "interim formula" on "a permanent basis". (Ibid.)

* On November 30, 1977 the Commission issued news release No. 13587 headed "Interim Formula for IRCs Adopted on Permanent Basis (Docket 19660)" which reported adoption of the Order on Remand and contained the routine caution that the release was "an unofficial announcement of the Commission's action." (At p. 3) The Release stated, inter alia,

"The decline in unrouted messages from 83 to 77 percent of the overseas traffic handled by WU following implementation of the interim formula, the Commission said, reinforced its belief that some beneficial competition would result in a change from the previous formula, but stated it did not believe an all-routed formula would add significantly to these benefits." (Ibid.)

This traffic data, albeit not the belief premised on it, disappeared from the released Report. As some staff person at the Commission apparently discovered at the last minute, the IQB data in the record is directly opposite to the Commission's analysis of it. The share of unrouted traffic in Western Union's overseas telegram filing

(Footnote continued on next page)

The Commission's Opinion identified as follows, the "primary question" which had been posed to it by the Court: "whether the interim formula may be justified outside of its role as precursor to an all-routed allocation formula." (SJA 952) The Commission's answer was that it could be.

The Agency quickly rejected the "three possible" defects in the ['interim'] formula" which RCA Globcom had raised in its comments. (SJA 958) It acknowledged, but dismissed as de minimis, the diversion, under the new formula, of unrouted traffic from direct to indirect routings. (SJA 959) It also acknowledged the increase in RCA Globcom's marketing costs occasioned by the new formula, but said that RCA Globcom had not "advanced specific facts to show that the public would be disserved by increased marketing efforts" (SJA 958).

The Commission recognized, as well, the validity of RCA Globcom's showing that the "interim" formula encouraged,

(footnote continued from previous page)

increased from 77% during the 1974 test period to 83% in the first semi-annual period under the "interim formula". (Compare SJA 1129 with SJA 1120, 1078.) Thus, actual experience refutes the FCC's decisional theory that the interim formula would lead to a reduction in unrouted traffic. The Commission's released Order on Remand, unable to explain this datum, simply ignores it. It is submitted that if a decrease in unrouted traffic was of decisional significance to the Commission, then an actual increase of some magnitude should be of equal decisional significance and require an opposite conclusion or at least some detailed explanation.

not the pursuit of non-routing customers (whose pursuit was the occasion for the interim formula in the first place (SJA 1146)), but the concentration of the IRCs' efforts "on existing customers who already route traffic" (SJA 959). But, here too, the Agency "d[id] not find anything in this marketing approach that persuades us to set aside the interim formula".* (SJA 959)

The Commission thought, on the other hand, that the "interim formula is a powerful incentive towards the achievement" of our "goal" of "encourag[ing] the carriers to continually strive to offer the public the best service possible at the lowest possible rates." (SJA 959) The prior formula, on the other hand, "stood as a disincentive to such improvements." (SJA 959-60) The new formula, by focusing on equal opportunity to generate routed traffic, would "encourage service and price improvements. . . to attract knowledgeable users," thus enhancing, as well, the "service to casual users." (SJA 960) **

* The proper question, it seems to us, is whether the Agency in the record before it, could find anything in this "approach" to persuade it to adopt the interim formula, thus justifying a repudiation of the original formula which had been adopted because the Commission then had found this same "approach", and its attendant expense to all affected carriers and to the public, contrary to the public interest. (10 F.C.C. at 191 (quoted at p. 16, supra))

** The Commission also believed that the interim formula could be easily administered by Western Union. (SJA 963)

The Commission also felt it necessary to seize upon the "improvements already made by ITT Worldcom under the interim formula." They "are of the type we anticipated the formula would inspire and provide concrete confirmation of the new formula's service to the public interest."* (SJA 964)

The Commission concluded, therefore, that that formula met the standards of Communications Act § 222(e)(3) and should be prescribed. (SJA 964)

SUMMARY OF ARGUMENT

The remainder of this brief will demonstrate that the actual evidence put before the Commission following remand, establishes that the interim formula has disserved the public interest (Point I); that the Commission has failed to justify its apparent conclusion that the interim formula is fair as between the carriers (Point II); that the Commission's current decision further exposes the substantial defects of its earlier condemnation of the original formula (Point III); and, that the

* In its zeal the Commission proved more royalist than the king. ITT Worldcom, in presenting its catalog of recent "improvements", had euphemistically referred to the "possibility" that they would have occurred anyway, without regard to the formula change. (SJA 1040) The Commission did not even mention, let alone attempt to evaluate, this "possibility" -- which we suggest should more realistically be described as a "virtual certainty".

Commission's hearing procedures on remand were inadequate. For all these reasons, or any one or more of them, the Commission's Orders should be set aside by this Court.

POINT I

SUBSTANTIAL EVIDENCE DEMONSTRATES
THAT IMPLEMENTATION OF THE INTERIM
FORMULA HAS DISSERVED THE PUBLIC INTEREST

The Commission entertains, quite obviously, a subjective preference for its "interim formula" -- so much so, in fact, that the Agency seems prepared to endorse it even though experience demonstrates:

(a) that the formula's implementation has achieved results almost directly opposite from those sought by the formula's initial promulgation;* and

(b) that its implementation has encouraged precisely the outcomes, adverse to the public interest, which an earlier Commission sought to avoid by its adoption of the original formula in 1943.

* Cf. White v. Dunbar, 119 U.S. 47, 51 (1886), where the Supreme Court memorably described a litigant's argument as a "nose of wax which may be turned and twisted in any direction."

Under Communications Act § 222(e), 47 U.S.C. § 222(e) (1970), such a naked preference does not, we submit, warrant the promulgation of a new formula.

The statute provides, in substance, for a contractual arrangement among the interested parties which the Commission is to regulate in the public interest. And the Commission may not, with propriety, mandate a new formula unless it finds, on substantial evidence, that the prescribed regime is, in the statute's words, "just, reasonable, equitable, and in the public interest and will be, so far as is consistent with the public interest, in accordance with the existing contractual rights of the carriers."*

* As the remainder of this brief will demonstrate, such findings as the Commission purports to have made fail to sustain its Order even under the minimal "arbitrary, capricious" standard of judicial review set forth in 5 U.S.C. § 706(2)(A)(1970). This standard is reserved, however, for review of informal agency actions and general rulemakings in which, apart from minimal requirements implied by the Administrative Procedure Act, there is no statutory mandate for a hearing. In contrast, in cases in which the agency is expressly required to provide a "hearing", the reviewing court must set aside the agency's action if it is "unsupported by substantial evidence in a case subject to Sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute." 5 U.S.C. § 706(2)(E)(1970). See Camp v. Pitts, 411 U.S. 138, 140-41 (1973). Whatever hearing procedures suffice to meet the "full hearing" mandate of Communications Act § 222(e)(3), that statute certainly contemplates a "hearing" of some type to produce a "record" upon which the Commission's action is to be taken. Thus, the proper standard of review of the Commission's Order is the more demanding "substantial evidence" test.

Here the Commission has purported to make the necessary findings. (SJA 964) The public interest "goal" which it claims by its Order to advance is the "encourage[ment of] the carriers to continually strive to offer the public the best service possible at the lowest possible rates". (SJA 959) We do not, of course, argue with this paraphrase of Communications Act § 1, as amended, 47 U.S.C. § 151 (1970). We do insist, however, that the Commission's chosen means -- the "interim formula" -- is patently ineffective to achieve the statutory end.

To the contrary, the only results demonstrably attributable to the shift from the original formula to the "interim formula" disserve that end. These demonstrable (and adverse) results are, of course, the ones identified in RCA Globcom's comments and acknowledged by the Commission. (SJA 952-54, 958-59, 974-1006)

(footnote continued from previous page)

Judicial review, even on a non-evidentiary record, must be "thorough, probing [and] in depth." City of Chicago v. FPC, 458 F.2d 731, 744 (D.C. Cir. 1971), cert. denied, 405 U.S. 1074 (1972), quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971).

"In every case, the object of review is to determine whether a reasoned conclusion from the record as a whole could support the premise on which the Commission's action rests." City of Chicago v. F.P.C., supra, 458 F.2d at 744.

Some of these adverse consequences -- the annual diversion of 50,000 unrouted overseas telegrams -- from direct to indirect deliveries (SJA 987) -- may be of relatively modest magnitude. But the direction of change is nonetheless clear. Moreover, other consequences of the formula shift admit of no disparagement for reasons of scale.

The "interim formula" rewards every shift of an already routed message from one IRC to another with several additional "bonus" messages. (SJA 981) The implementation of such a formula already has prompted substantial additional advertising and marketing expenditures by RCA Globcom (SJA 958) -- and quite probably by the other carriers which have not thought it expedient, at this stage, to describe their merchandising response to the new formula.*

Moreover, the expenditures thus far made are only the beginning. As the Commission itself observed,

* The paucity of "hard" information from ITT Worldcom and TRT about their advertising and marketing expenditures in the wake of the formula shift has a significance that can scarcely be overestimated. See Mammoth Oil Co. v. United States, 275 U.S. 13, 51 (1927), and Gotham Silk Hosiery Co. v. Artcraft Silk Hosiery Mills, Inc., 147 F.2d 209, 214 (3d Cir. 1944), each quoting with approval Lord Mansfield's wise caution in Blatch v. Archer, Cowp. 63, 65, 98 Eng.Rep. 969 (K.B. 1774):

"[A]ll evidence is to be weighed according to the proof which it was in the power of one side

(Footnote continued on next page)

"[T]he interim formula has brought about greater competitive efforts by the IRCs and that to expand its volume of message traffic, or to retain its substantial standing in the market it must increase its marketing efforts." (SJA 958)

Comprehensive marketing efforts, not yet made because the "interim formula" is not yet final, would run to millions of dollars per carrier. (SJA 958)

The Commission would ignore all of this because RCA Globcom "does not advance specific facts to show that the public interest would be disserved by increased marketing efforts". (SJA 958) But what "specific facts" did the Commission expect RCA Globcom to show? Who does the Commission think will pay, in the not-so-long run, for these efforts if not the rate payer? The Commission does not presume to suggest that the increased merchandising efforts by RCA Globcom and the

(footnote continued from previous page)

to have produced and in the power of the other side to have contradicted."

This country's most celebrated commentator on the law of evidence has put the same idea in the following terms:

"The non-production of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its tenor is unfavorable to the party's cause. Ever since the case of the Chimney-sweeper's Jewel [Armory v. Delamirie, 1 Strange 505, 93 Eng. Rep. 664 (K.B. 1722)], this has been a recognized principle. . . ." 2 J. WIGMORE, EVIDENCE 162 (3d ed. 1940) (emphasis in original).

other carriers are likely to reverse the secular decline in the demand for overseas telegrams, thus creating new business to offset the costs of additional sales personnel and more extensive advertising.

The burdens of additional expenses are magnified by a fact which RCA Globcom demonstrated, TRT proclaimed (SJA 1083), and the Commission acknowledged (SJA 959). The carriers' expanded marketing effort are most sensibly directed, not at the occasional user who does not "route" his overseas telegrams, but at the established communicators who already do so. The Commission is unperturbed. There may be, it says, a connection between such concentrated salesmanship and improved service to the general public (SJA 960). It does not, however, explain why this is so -- or why the quite different appraisal of the same phenomenon by the Commission which promulgated the original formula (see pp. 13-14, supra) now is wrong.*

* The relationship between service to "business customers . . . [who] educate themselves about the IRCs" (SJA 960) and service to the public at large is more problematic than the Commission, in its rush to judgment, seems willing to allow. Consider, for example, the experience in the airline industry which, like the overseas telegram business, offers multiple carriers providing substantially fungible services between the same points.

The Civil Aeronautics Board has found it consistently necessary to counter, by regulatory policy, the incentive of the airlines to woo with ever more commodious seats,

(Footnote continued on next page)

The Commission's attempted counter to this damning record is simple and straight-forward. The "interim formula", since it is more "competitive" than its predecessor, will be a "powerful incentive" to better service. The earlier arrangements, on the other hand, "stood as a disincentive to such improvements". (SJA 954-60)

The Commission sounded the same theme the last time the case was here. The Court at that time observed that "[t]he FCC's statements of possible improvement are wholly suppositional". (563 F.2d at 2, SJA 947) Conversely, the Court noted, "high quality of service is conceded [under the prior formula], and there is no showing that the carriers have not availed

(footnote continued from previous page)

choicer meals, and larger drinks the "educated" and repetitive business travelers who normally ride first class. As the Board was forced to recognize, this exercise, if uncontrolled, is likely to be subsidized by the fares of the traveler who makes an infrequent vacation trip in the coach section.

It is worthwhile in this connection, to examine, with some particularity, the service "improvements" which ITT Worldcom's comments proclaim with such fanfare (SJA 1040-44). While none of them, in our judgment, compares favorably with the massive advances made by all carriers between 1943 and 1976, each is directed at the subscribers to telex and TWX (a Western Union trade name for a form of telex) and at the other "educated" customers who already are likely to route. The utility of these "improvements" to the "hinterland" customer who files an occasional overseas telegram with Western Union is quite obscure. The latter customer is, of course, the one whom the Commission, in its earlier Orders, had had us believe it was trying to help. (SJA 1140)

themselves of the most modern technological devices." (559 F.2d at 889, SJA 943)

The Commission's projections of improvements to be stimulated by the "interim formula" remain, we submit, "wholly suppositious". The Agency points repeatedly to various operational changes, all quite minor (SJA 955, 964), which ITT Worldcom has made since the Commission's entry of its Initial Order. But it offers no plausible explanation of the cause-and-effect relationship which its endorsement of these "improvements" implies -- and requires if the endorsement is to make any sense. Without it, this Court once again confronts, not a reasoned appraisal of a relevant record, but the same dogmatic speculation which it heard the last time this case was here.

There is, in the field of regulated communications, no equation between "more competition" and the "public interest". FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Hawaiian Tel. Co. v. FCC, 498 F.2d 771 (D.C. Cir. 1974). The relationship, if it exists, must be shown. Here the Commission has simply assumed it -- and the Agency has advanced this naked ideological preference in the teeth of a record which confirms the wisdom of the earlier Commission which sought, by the original formula, to

"[diminish] the incentive of the international carriers to expend effort and revenues in attempts to divert traffic from each other by solicitation efforts which may not improve quality of service." (10 F.C.C. at 191)

POINT II

THE COMMISSION HAS FAILED TO
JUSTIFY ITS APPARENT CONCLUSION
THAT THE INTERIM FORMULA IS FAIR
AS BETWEEN THE PARTIES

Communications Act § 222(e), 47 U.S.C. § 222(e) (1970) requires an international formula promulgated by the Commission, not only to serve the "public interest" (which the "interim formula" does not), but to pass a test of inter-carrier fairness implicit in the statutory standards of "justness", "reasonableness" and "equity". The Commission, we submit, also has failed to justify its "interim formula" in terms of this fairness requirement.

On this subject the Commission notes in its Order on Remand only that "the interim formula provides each carrier with the same opportunity as every other carrier to share in the pool of unrouted overseas messages Western Union receives." (SJA 963) But equality of access to unrouted traffic was not a criterion, let alone the criterion, of fairness in the rule-making by which the Commission established the original formula. Then the guiding principle of inter-carrier fairness was mutual agreement based on the parties' compromise of existing rights and interests.

The Commission does not explain why a concept of mechanical "equality" imposed by Agency fiat now should displace

respect for the parties' mutual agreement as the basis for the "fairness" determination required by Communications Act § 222(e). The Agency in its rush to reaffirm its earlier rulings (facts or not), simply asserts that result.

The Commission does not, for example, suggest, let alone find, that RCA Globcom ever has abused or misused the position granted to it by the original formula. RCA Globcom did not slight service to destinations where it received the bulk of the unrouted traffic or to destinations where, by the parties' agreement, some other carrier was so favored. RCA Globcom has served the public well and effectively everywhere. Similarly, the Commission does not suggest, let alone find, that the original formula has thwarted any unusual merit on the part of the other carriers.

The cases require more than assertion, they demand considered explanation, if an agency is to change so radically the policies which it enforces through its rulemaking power. This Court recently articulated familiar principles of administrative law when it wrote in Office of Communication of The United Church of Christ v. FCC, 560 F.2d 529, 532-33 (2d Cir. 1977):

"Here the Commission is seeking to change its policy, and, as held in Columbia Broadcasting System, Inc. v. FCC, 147 U.S.App.D.C. 175, 454 F.2d 1018, 1026 (1971), such changes in policy

must be rationally and explicitly justified in order to assure 'that the standard is being changed and not ignored, and . . . that [the agency] is faithful and not indifferent to the rule of law.' Although an agency must be given flexibility to reexamine and reinterpret its previous holdings, it must clearly indicate and explain its action so as to enable completion of the task of judicial review. Atchison, Topeka & Santa Fe Railway v. Wichita Board of Trade, 412 U.S. 800, 806-09, 93 S.Ct. 2367, 37 L.Ed.2d 350 (1973) (plurality opinion). There must be a thorough and comprehensible statement of the reasons for the decision, see Administrative Procedure Act § 4(b), 5 U.S.C. § 553(c); National Nutritional Foods Association v. Weinberger, 512 F.2d 688, 701 (2d Cir.), cert. denied, 423 U.S. 827, 96 S.Ct. 44, 46 L.Rd.2d 44 (1975). In this case, therefore, the FCC did not have the leeway that may be given an agency in the initial promulgation of cut-off criteria for the applicability of regulations. We deal here with a change in such criteria, and hence we must find that the FCC had a rational, articulated explanation for its action in order to uphold its decision."

See also Secretary of Agriculture v. United States, 347 U.S. 645, 653-54 (1954); Garrett v. FCC, 513 F.2d 1056, 1060-61 (D.C. Cir. 1975); FTC v. Crowther, 430 F.2d 510, 514 (D.C. Cir. 1970); cf. Marco Sales Co. v. FTC, 453 F.2d 1, 6-7 (2d Cir. 1971); Friends of the Earth v. FCC, 449 F.2d 1164 (D.C. Cir. 1971); Rayonier Inc. v. NLRB, 380 F.2d 187, 189 (5th Cir. 1967).

Here the Commission has not met its obligation to compile the evidence and after thorough analysis of that evidence, provide satisfactory explanation of why the new formula's repudiation of inter-carrier agreement as the basis for the formula is "just", "reasonable" and "equitable".

POINT III

THE COMMISSION'S LATEST ORDER
HAS FURTHER EXPOSED THE DEFECTS
OF ITS EARLIER CONDEMNATION OF
THE ORIGINAL FORMULA

In the third point of the brief which RCA Globcom filed with this Court on October 29, 1976 we addressed (at pp. 43-47) a proposition which the Court, in its earlier opinions, did not find it necessary to discuss, viz. "The Commission's Findings Condemning the Prior Formula Are Arbitrary and Capricious and Unsupported by Substantial Evidence" (id. at 43).

We there demonstrated that the original formula did not, as the Commission phrased it in its Initial Order, "stifle user choice" (SJA 1139) -- rather it honored routings by those customers who cared to make them. Similarly, the traffic distributions to the various destination subareas resulting from accumulated "overages" and "deficiencies" were not the "distortions" which the Commission called them, but the working out of the "reasonable competition" which the original formula had been designed to "continue and even promote." See Separate Report, 10 F.C.C. 184, 195 (1943).*

* At the time the Commission initiated its proceeding to reconsider the shape of the International Formula only about 11% of the traffic distributed by Western Union was subject to its so-called "balancing" or "market sharing" provisions whereby a carrier's gain of a routed message could be offset by the loss of an unrouted message. (SJA 1014, 1133)

We invite the Court's continuing attention to our prior analysis. It has, we submit, been strengthened by the Commission's Order on Remand. If, as the Commission now suggests, it is a proper function of the International Formula to encourage the IRCs' pursuit, not of the scattered social users who infrequently file overseas telegrams with Western Union, but the "educated" volume communicators who already route, it is difficult to see why the original formula does not pass muster even under that test.

The IRCs were free under the original formula to seek routings and, if successful, to keep the benefits of such routings. Traffic routed by a customer to a particular IRC was distributed as the customer chose, not in accordance with a "quota". Moreover, RCA Globcom had, under the original formula, no "gateway" quota to Latin American and European destination subareas so that its own traffic originations to these areas had no effect on the distribution of any other traffic.

The Commission's scorn for the original formula shares the vice of the Agency's enthusiasm for that formula's proposed replacement. It is unjustified by reasoned analysis of even the sparse and incomplete record the Commission permitted to be compiled below.

POINT IV

THE COMMISSION'S HEARING PROCEDURES
ON REMAND WERE INADEQUATE

In its earlier briefings to this Court, RCA Globcom argued that the Commission could not amend the International Formula by the "notice-and-comment" procedures of 5 U.S.C. § 553(c)(1970) and that Communications Act § 222(e)(3), by mandating a "full hearing", required the Agency to accord the carriers a trial-type hearing of the kind contemplated by 5 U.S.C. §§ 556, 557 (1970), as amended, Act of Sept. 13, 1976, Pub. L. No. 94-409, 90 Stat. 1246-47. The Court rejected that position, holding that the many rounds of comments which preceded the Initial Order represented, in the circumstances of this case, a sufficient hearing. (559 F.2d at 887, SJA 941)

We have no inclination to reargue the categorical position at this point. But the Commission's procedure on remand involved only a single round of simultaneous comments by all parties with no opportunity for rebuttal and no chance to test, by limited discovery or adversarial processes, the factual claims of other parties. (SJA 972-73) They represented, we submit, an insufficient basis for the judgments and findings which the Commission undertook to make in its Order on Remand.

Whatever a "full hearing" may precisely require, it certainly comprehends procedures adequate to fairly ventilate

the matters which the Commission must decide if it is to amend the International Formula. In light of the issues posed to the Commission on remand, the Agency's procedures were inadequate in this fundamental sense.

This Court, in rejecting RCA Globcom's view that Section 222(e)(3) established a per se trial by evidentiary hearing rule, did not leap to the extreme of suggesting that any Commission procedure, however flimsy, was enough. Rather, the Court pointed to the current "emphasis . . . on the requirements of the particular case, not on formalistic interpretations of statutory words." (559 F.2d at 886, SJA 940) The panel, it seems to us, squarely aligned this Court with the emerging body of case law which holds that "[t]he kind of procedure . . . must take into account the kind of questions involved," Walter Holm & Co. v. Hardin, 449 F.2d 1009, 1015 (D.C. Cir. 1971), and that the agency must "realistically tailor the proceedings to fit the issues before it. . . ." City of Chicago v. FPC, 458 F.2d 731, 744 (D.C. Cir. 1971), cert. denied, 405 U.S. 1074 (1972).*

* See also Bell Telephone Co. v. FCC, 503 F.2d 1250, 1264-65 (3d Cir. 1974), cert. denied, 422 U.S. 1026 (1975), an authority which this Court considered at some length in its earlier opinion in this case (see 559 F.2d at 885, SJA 939), and Mobil Oil Corp. v. FPC, 483 F.2d 1238, 1253-54 (D.C. Cir. 1973); Appalachian Power Co. v. EPA, 477 F.2d 495 (4th Cir. 1973); cf. Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Commission, 539 F.2d 824, 838-39 (2d Cir. 1976), cert. granted, 430 U.S. 944 (1977).

Measured by this test the single, unanswerable round of comments which the Commission allowed on remand was inadequate. The procedure did not "foster", it was calculated to preclude, what the Court of Appeals for the District of Columbia Circuit has called "a real give and take . . . on the key issues." Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Commission, 547 F.2d 633, 645 (D.C. Cir. 1976), cert. granted, 97 S.Ct. 1098 (1977).

Here, it seems to us, the Commission swallowed whole ITT Worldcom's suggestions (tentative at best) that the formula shift had encouraged certain service improvements by that carrier. The cause-and-effect relationship is critical to the Commission's theory of competitive stimulus. Yet the Agency afforded no opportunity to the other carriers to point out what these vaguely described "improvements" represented in practice; why, if they made sense to ITT Worldcom in 1976 and 1977, they would have made similar sense if the original formula had remained in effect; and what other (and much more significant) improvements had been implemented by all carriers under the supposed "disincentives" of the original formula.

The logical fallacy of post hoc ergo propter hoc is so familiar and so obvious that the Commission should have recognized its application to ITT Worldcom's comments without the

need for further exposition by anyone. But, if the Agency thought ITT Worldcom's "may be's" and "could be's" worthy of consideration at all, the Commission certainly should have afforded a chance to reply and an opportunity to test ITT Worldcom's affidavit testimony by cross-examination or by interrogatories.

Another factual issue central to "public interest" determination which the Commission must make concerns the extent of the additional marketing costs attributable to the actual "stimulus" of the "interim formula." (See 559 F.2d at 889, SJA 943.) When the two carriers which had no litigation incentive to expose their experiences in this regard ignored the matter in their comments, the Commission should have authorized procedures by which the relevant data would have been exposed to view. The Agency's rules allow interrogatories in appropriate cases, and this was such a case.

In a proceeding governed by Communications Act § 222(e)(3), the Commission cannot properly say, "I have made up my mind -- don't bother me with the facts." Its chosen procedures implicitly did so.

CONCLUSION

The "interim formula" does not serve the public interest or meet the other statutory standards of Communications Act § 222(e)(3). The various Orders of the Commission purporting to prescribe it should be vacated and set aside.

Respectfully submitted,

CAHILL GORDON & REINDEL
Attorneys for Petitioner
RCA Global Communications, Inc.
Office and P. O. Address:
80 Pine Street
New York, New York 10005
(212) 825-0100

Of Counsel:

H. RICHARD SCHUMACHER
ROBERT T. QUINN
JOHN A. SHUTKIN

and

FRANCES J. DeROSA
CHARLES M. LEHRHAUPT
RCA Global Communications, Inc.
60 Broad Street
New York, New York 10004

January 27, 1978

STATUTORY APPENDIX

STATUTORY APPENDIX - TABLE OF CONTENTS

	PAGE
Communications Act of 1934, Section 151, 47 U.S.C. § 151.....	1a
Communications Act of 1934, Section 222, 47 U.S.C. § 222.....	1a
Administrative Procedure Act, Section 4, 5 U.S.C. § 553(c).....	6a
Administrative Procedure Act, Section 7, 5 U.S.C. § 556.....	7a
Administrative Procedure Act, Section 8, 5 U.S.C. § 557.....	9a
Administrative Procedure Act, Section 10(e), 5 U.S.C. § 706.....	10a

Communications Act
Section 1, 47 U.S.C. § 151

§ 151. Purposes of chapter; Federal Communications Commission created.

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

Communications Act of 1934,
Section 222, 47 U.S.C. § 222

§ 222. Consolidations and mergers of telegraph carriers.

(a) Definitions.

As used in this section-

(1) The term "consolidation or merger" includes the legal consolidation or merger of two or more corporations, and the acquisition by a corporation through purchase, lease, or in any other manner, of the whole or any part of the property, securities, facilities, services, or business of any other corporation or corporations, or of the control thereof, in exchange for its own securities, or otherwise.

(2) The term "domestic telegraph carrier" means any common carrier by wire or radio, the major portion of

Statutory Appendix

whose traffic and revenues is derived from domestic telegraph operations; and such term includes a corporation owning or controlling any such common carrier.

(3) The term "international telegraph carrier" means any common carrier by wire or radio, the major portion of whose traffic and revenues is derived from international telegraph operations; and such terms includes a corporation owning or controlling any such common carrier.

(4) The term "consolidated or merged carrier" means any carrier by wire or radio which acquires or operates the properties and facilities unified and integrated by consolidation or merger.

(5) The term "domestic telegraph operations" includes acceptance, transmission, reception, and delivery of record communications by wire or radio which either originate or terminate at points within the continental United States, Alaska, Canada, Saint Pierre-Miquelon, Mexico, or Newfoundland and terminate or originate at points within the continental United States, Alaska, Canada, Saint Pierre-Miquelon, Mexico, or Newfoundland, and includes acceptance, transmission, reception, or delivery performed within the continental points of origin within and points of exit from, and between United States between points of entry into and points of designation within, the continental United States with respect to record communications by wire or radio which either originate or terminate outside the continental United States, Alaska, Canada, Saint Pierre-Miquelon, Mexico, and Newfoundland, and also includes the transmission within the continental United States of messages which both originate and terminate outside but transit through the continental United States: Provided, That nothing in this section shall prevent international telegraph carriers from accepting and delivering international telegraph messages in the cities which constitute gateways approved by the Commission as points of entrance into or exit from the continental United States, under regulations prescribed by the Commission, and the incidental transmission or reception of the same over its own or leased lines or circuits within the continental United States.

(6) The term "international telegraph operations" includes acceptance, transmission, reception, and delivery of record communications by wire or radio which either originate or terminate at points outside the continental United States, Alaska, Canada, Saint Pierre-Miquelon, Mexico, and Newfoundland, but does not include acceptance, transmission, reception, and delivery performed within the continental

Statutory Appendix

United States between points of origin within and points of exit from, and between points of entry into, and points of destination within, the continental United States with respect to such communications, or the transmission within the continental United States of messages which both originate and terminate outside but transit through the continental United States.

(7) The terms "domestic telegraph properties" and "domestic telegraph facilities" mean properties and facilities, respectively, used or to be used in domestic telegraph operations.

(8) The term "employee" or "employees" (i) shall include any individual who is absent from active service because of furlough, illness, or leave of absence, except that there shall be no obligation upon the consolidated or merged carrier to reemploy any employee who is absent because of furlough, except in accordance with the terms of his furlough, and (ii) shall not include any employee of any carrier which is a party to a consolidation or merger pursuant to this section to the extent that he is employed in any business which such carrier continues to operate independently of the consolidation or merger.

(9) The term "representative" includes any individual or labor organization.

(10) The term "continental United States" means the District of Columbia and the States of the Union, except Hawaii.

(b) Consolidation or merger authorized; acquisition of facilities.

(1) It shall be lawful, upon application to and approval by the Commission as hereinafter provided, for any two or more domestic telegraph carriers to effect a consolidation or merger; and for any domestic telegraph carrier, as a part of any such consolidation or merger or thereafter, to acquire all or any part of the domestic telegraph properties, domestic telegraph facilities, or domestic telegraph operations of any carrier which is not primarily a telegraph carrier: Provided, That, except as provided in paragraph (2) of this subsection, no domestic telegraph carrier shall effect a consolidation or merger with any international telegraph carrier, and no international telegraph carrier shall effect a consolidation or merger with any domestic telegraph carrier.

Statutory Appendix

(2) As a part of any such consolidation or merger, or thereafter upon application to and approval by the Commission as hereinafter provided, the consolidated or merged carrier may acquire all or any part of the domestic telegraph properties, domestic telegraph facilities, or domestic telegraph operations of any international telegraph carrier.

(c) Application to Commission; public hearings; determination of public interest; approval; divestment of international operations.

(1) Whenever any consolidation or merger is proposed under subsection (b) of this section, the telegraph carrier or telegraph carriers seeking authority therefor shall submit an application to the Commission, and thereupon the Commission shall order a public hearing to be held with respect to such application and shall give reasonable notice thereof, in writing, and an opportunity to be heard, to the Governor of each of the States in which any of the physical property involved in such proposed consolidation or merger is situated, to the Secretary of State, the Secretary of Defense, the Attorney General of the United States, representatives of employees where represented by bargaining representatives known to the Commission, and to such other persons as the Commission may deem advisable. If, after such public hearing, the Commission finds that the proposed consolidation or merger, (1) is authorized by subsection (a) of this section, (2) conforms to all other applicable provisions of this section, (3) is in the public interest, the Commission shall enter an order approving and authorizing such consolidation or merger, and thereupon any law or laws making consolidations and mergers unlawful shall not apply to the proposed consolidation or merger. In finding whether any proposed consolidation or merger is in the public interest the Commission shall give due consideration, among other things, to the financial soundness of the carrier resulting from such consolidation or merger.

(2) Any proposed consolidation or merger of domestic telegraph carriers shall provide for the divestment of the international telegraph operations theretofore carried on by any party to the consolidation or merger, within a reasonable time to be fixed by the Commission, after the consideration for the property to be divested is found by the Commission to be commensurate with its value, and as soon as the legal obligations, if any, of the carrier to be so divested will permit. The Commission

Statutory Appendix

shall require at the time of the approval of such consolidation or merger that any such party exercise due diligence in bringing about such divestment as promptly as it reasonably can.

(d) Alien ownership of capital stock.

* * *

(e) Distribution of telegraph traffic among international carriers; contiguous foreign country defined; intervention of Commission; international and domestic operations construed.

(1) In the case of any consolidation or merger of telegraph carriers pursuant to this section, the consolidated or merged carrier shall, except as provided in paragraph (2) of this subsection, distribute among the international telegraph carriers, telegraph traffic by wire or radio destined to points without the continental United States, and divide the charges for such traffic, in accordance with such just, reasonable, and equitable formula in the public interest as the interested carriers shall agree upon and the Commission shall approve: Provided, however, That in case the interested carriers should fail to agree upon a formula which the Commission approves as above provided, the Commission, after due notice and hearing, shall prescribe in its order approving and authorizing the proposed consolidation or merger a formula which it finds will be just, reasonable, equitable, and in the public interest, will be, so far as is consistent with the public interest in accordance with the existing contractual rights of the carriers, and will effectuate the purposes of this subsection.

(2) In the case of any consolidation or merger pursuant to this section of telegraph carriers which immediately prior to such consolidation or merger, interchanged traffic with telegraph carriers in a contiguous foreign country, the consolidated or merged carrier shall distribute among such foreign telegraph carriers, telegraph traffic by wire or radio destined to points in such contiguous foreign country and shall divide the charges therefor, in accordance with such just, reasonable, and equitable formula in the public interest as the interested carriers shall agree upon and the Commission shall approve: Provided, however, That in case the interested carriers should fail to agree upon a formula which the Commission approves as above provided, the Commission, after due notice and hearing, shall prescribe in its order approving and authorizing the proposed consolidation or

Statutory Appendix

merger a formula which it finds will be just, reasonable, equitable, and in the public interest, will be, so far as is consistent with the public interest, in accordance with the existing contractual rights of the carriers, and will effectuate the purposes of this subsection. As used in this paragraph, the term "contiguous foreign country" means Canada, Mexico, or Newfoundland.

(3) Whenever, upon a complaint or upon its own initiative, and after a full hearing, the Commission finds that any such distribution of telegraph traffic among telegraph carriers, or any such division of charges for such traffic, which is being made or which is proposed to be made, is or will be unjust, unreasonable, or inequitable, or not in the public interest, the Commission shall by order prescribe the distribution of such telegraph traffic, or the division of charges therefor, which will be just, reasonable, equitable, and in the public interest, and will be, so far as is consistent with the public interest, in accordance with the existing contractual rights of the carriers.

(4) For the purposes of this subsection, the international telegraph operations of any domestic telegraph carrier shall be considered to be the operations of an independent international telegraph carrier, and the domestic telegraph operations of any interantional carrier shall be considered to be the operations of an independent domestic telegraph carrier.

(f) Protection of employees.

* * *

Administrative Procedure Act
Section 553(c), 5 U.S.C. § 553(c)

§ 553. Rule making.

* * *

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

Statutory AppendixAdministrative Procedure Act
Section 556, 5 U.S.C. § 556

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision.

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence-

- (1) the agency;
- (2) one or more members of the body which comprises the agency; or
- (3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may-

- (1) administer oaths and affirmations;
- (2) issue subpoenas authorized by law;
- (3) rule on offers of proof and receive relevant evidence;

Statutory Appendix

- (4) take depositions or have depositions taken when the ends of justice would be served;
- (5) regulate the course of the hearing;
- (6) hold conferences for the settlement or simplification of the issues by consent of the parties;
- (7) dispose of procedural requests or similar matters;
- (8) make or recommend decisions in accordance with section 557 of this title; and
- (9) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely requests, to an opportunity to show the contrary.

Statutory AppendixAdministrative Procedure Act
Section 557, 5 U.S.C. § 557

§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearing pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses-

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

*

*

*

Statutory Appendix

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of-

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

Administrative Procedure Act
Section 706, 5 U.S.C. § 706

§ 706. Scope of review.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall-

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be-

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

Statutory Appendix

- (D) without observance of procedure required by law;
- (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
- (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- - - - - x

RCA GLOBAL COMMUNICATIONS, INC., :

Petitioner, :

-against- :

Docket No. 76-4054

FEDERAL COMMUNICATIONS COMMISSION :
and UNITED STATES OF AMERICA, :

AFFIDAVIT OF SERVICE

Respondents, :

ITT WORLD COMMUNICATIONS INC., :
TRT TELECOMMUNICATIONS CORP. and :
WESTERN UNION INTERNATIONAL, INC. :

Intervenors. :

- - - - - x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

H. RICHARD SCHUMACHER, being duly sworn deposes and
says:

I am one of the attorneys for Petitioner RCA Global
Communications, Inc. in this matter. I certify that Petitioners'
Brief dated October 29, 1976 and the Joint Appendix have been
served as follows:

(a) Copies in the required number have been delivered
by hand to the offices of LeBoeuf, Lamb, Leiby & MacRae, Attn:

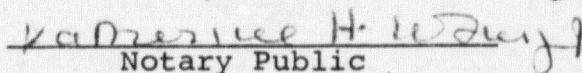
Charles P. Sifton, Esq., 140 Broadway, New York, New York
10005, Attorneys for Intervenor ITT World Communications Inc.;
and Stroock & Stroock & Lavan, Attn: Alvin K. Hellerstein,
Esq., 61 Broadway, New York, New York, Attorneys for Intervenor
Western Union International, Inc.; and

(b) Copies in the required number have been forwarded
to my firm's Washington, D. C. office where they will be
delivered this date by hand to General Counsel, Federal Communi-
cations Commission, Attn: Jack David Smith, Esq., 1919 M Street,
N.W., Washington, D. C. 20554, Attorney for Respondent Federal
Communications Commission; Attorney General of the United States,
Attn: Donald I. Baker, Esq., U. S. Department of Justice,
Washington, D. C. 20531, Attorney for Respondent United States
of America; and Covington & Burling, Attn: E. Edward Bruce,
Esq., 888 16th Street, N.W., Washington, D. C. 20006, Attorneys
for Intervenor TRT Telecommunications Corp.



H. Richard Schumacher

Sworn to before me this
29th day of October, 1976


Notary Public

KATHERINE H. W. SWIFT
Notary Public, State of New York
No. 31-9268000
Certificate filed in New York County
Commission Expires March 30, 1978